No. 20894

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HONOLULU STAR BULLETIN, INC., AND ADVERTISER PUBLISHING CO., LTD., d/b/a HAWAII NEWSPAPER OPERATORS, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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This reply brief is addressed to two contentions advanced in respondent's brief: (1) respondent's contention that the requirement that a waiver of the right to bargain about a subject must be "clear and unmistakable" does not apply where the collective bargaining agreement refers to that subject; and (2) respondent's contention that a provision in respondent's contract with the Union stating that "nothing in this agreement shall limit the right of the employer, at its discretion, to pay amounts in

excess of the salaries set forth above" insulates respondent from its statutory obligation to bargain about bonuses. Neither of these contentions is sound.

1. There is no justification for making inapplicable the requirement that a waiver be shown clearly and unmistakably where a party attempts to demonstrate such a waiver on the basis of contract language. On the contrary, the reason for the strict waiver rule is that it prevents strikes by avoiding the accumulation of resentment, dissatisfaction and frustration which preclusion of bargaining might arouse in employees where a dispute arises over a matter not settled in a contract. This rule, as shown in our opening brief (pp. 12-20), effectuates a basic objective of the Act—encouraging collective bargaining as a means of eliminating industrial strife. Where, as here, a term or condition of employment (bonuses) is not fixed by the contract, the Board's view is that it must be settled by bargaining unless the Union or employer has clearly and unmistakably waived its right to bargain about this particular subject. The policy is equally applicable whether the party relies on contract language or contract negotiations to establish waiver.[1] And, contrary to re-

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[1] In *Tide Water Associated Oil Co.*, 85 NLRB 1096, the Board found that a "vague" management prerogative clause which made no specific reference to pension plans did not demonstrate that the union "clearly and unmistakably" waived its right to bargain about that subject. See also, *Inland Steel Company*, 77 NLRB 1, 14-15; *Proctor Manufacturing Corp.*, 131 NLRB 1166.

spondent's contention (Br. p. 17), the application of a strict waiver rule where the waiver is sought to be supported by contract language has been judicially approved. See *N.L.R.B.* v. *Otis Elevator Co.*, 208 F. 2d 176 (C.A. 2), where Judge Clark observed (*id.* at 178-179):

> We do not doubt that there are areas where it is highly desirable that management have exclusive responsibility . . . But the general philosophy of the Act and the general desirability of joint participation and responsibility suggest that *any private reservations of power must be clearly described and delimited in the contract.* [Emphasis added.]

Accord, *Timkin Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746, 751 (C.A. 6) (dictum). Cf. *N.L.R.B.* v. *Item Co.*, 220 F. 2d 936, 958-959 (C.A. 5).

2. To demonstrate that the Union has waived its right to bargain about bonuses, respondent relies heavily on a provision in the contract[2] stating:

> Nothing in this agreement shall limit the right of the employer, at its discretion, to pay amounts in excess of the salary set forth above.

This argument is an afterthought, as respondent itself concedes.[3] Respondent did not refer to this

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[2] This provision appears as the last sentence on the last page (page 6) of Exhibit A, a comprehensive salary classification chart, which is appended to the 19-page collective bargaining agreement between the parties effective from October 1, 1963, to May 31, 1966 (G. C. Exh. 2).

[3] See resp. br. p. 20, n. 1.

provision of its contract during the Board proceedings. And Section 10(e) of the Act provides that "no objection that has not been urged before the Board, its member, agent, or agency shall be considered by the court, unless failure or neglect to urge such objection shall be excused because of extraordinary circumstances." [4] Under well-settled law, therefore, respondent is foreclosed at this late date from now urging the above-quoted contract clause as a defense to its refusal to bargain. See, for example, *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *N.L.R.B.* v. *District 50, United Mine Workers*, 355 U.S. 453, 463-464; *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253, 256; *N.L.R.B.* v. *Guistina Bros. Lumber Co.*, 253 F. 2d 371, 374 (C.A. 9); *Retail Clerks Int'l Ass'n* v. *N.L.R.B.*, —— F. 2d —— (C.A. D.C.), 62 LRRM 2837, 2841 (decided August 16, 1966). The rationale behind the enactment of Section 10(e) is that the orderly administration of the Act requires that the Board be apprised of all objections to the Trial Examiner's findings and conclusions so that the Board may properly discharge its duty. *N.L.R.B.* v. *Pugh & Barr, Inc.*, 194 F. 2d 217, 220 (C.A. 4). Plainly, having failed to apprise the Board of its contention that the quoted provision constitutes a waiver, respondent is precluded from arguing here that the Board's order should be denied enforcement on that ground.

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[4] Respondent has not come forward with any "extraordinary circumstances" to justify its failure to urge this contract provision before the Board.

Moreover, even if respondent could rely on the cited provision, that provision does not clearly and unmistakably evidence a waiver of the union's right to bargain concerning bonuses. Fairly read, that provision grants respondent the right to increase hourly or weekly salaries paid to employees, and has no bearing upon bonuses. Thus, the provision in question appears at the end of a six-page Appendix to the contract containing the rates to be paid employees in the job classifications set out in the Appendix.[5] Respondent's contention that this is too narrow an interpretation of the quoted provision because the word "amounts" could comprehend both bonuses and salaries (Br. pp. 20-22), demonstrates only that the language is not free from ambuiguity. And in the absence of any record evidence demonstrating precisely what the parties intended when they inserted this provision at the termination of their negotiations, respondent's argument is insufficient to establish a clear and unmistakable waiver.[6]

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[5] Management's right to raise salaries unilaterally would thus complement the right of individual employees to bargain for salaries in excess of the minimum scale set forth in the contract. See Sec. 12(b) of G. C. Exh. 2. Such departures from "scale" wages are apparently not unusual in the newspaper business. See *Boston Herald-Traveler Corp.* v. *N.L.R.B.*, 223 F.2d 58, 59 (C.A. 1).

[6] The Board's order requiring respondent to bargain, upon request, concerning the formulation of new bonus plans does not, contrary to respondent (Br. pp. 26-29), run afoul of Section 8(d) of the Act. That section provides, in relevant part, that the duty to bargain collectively "shall not be construed as requiring either party to discuss or agree to any modification

CONCLUSION

For the foregoing reasons and for the reasons set out in our opening brief, we respectfully submit that the Board's order should be enforced in full.

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of the terms and conditions contained in a contract for a fixed period . . ." Thus, Section 8(d) excuses an employer from any duty to bargain during the contract term with respect to subjects expressly covered by such contract. *N.L.R.B.* v. *Jacobs Mfg. Co.*, 196 F. 2d 680 (C.A. 2); *Tide Water Associated Oil Co., supra,* 85 NLRB 1096, 1098. Here, however, as noted, the subject of bonuses was neither explored during contract negotiations nor embodied in any clearly defined manner in the contract itself. Consequently, 8(d) poses no impediment to enforcement of the instant order.

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